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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA

No. CR13 0764 WHO

11 Plaintiff,

**DEFENDANT FERDINAND'S REPLY
TO UNITED STATES' OPPOSITION
TO MOTION TO SUPPRESS**

12 v.
13

14 ESAU FERDINAND,

Date: October 15, 2015

Time: 9:00 a.m.

15 Defendant.
_____ /

Crtrm.: Honorable William H. Orrick

16 **INTRODUCTION**
17

18 Defendant Esau Ferdinand hereby replies to the **UNITED STATES' OMNIBUS**
19 **OPPOSITION TO DEFENDANT FERDINAND AND HARDING MOTIONS TO**
20 **SUPPRESS** [hereinafter "Opposition"] [Dkt. No. 512], to the extent it addresses the cell phone
21 search challenged in Defendant Ferdinand's motion [Dkt. No. 482]. The government has a
22 blanket explanation that the 2011 search of the Ferdinand cell phone was a legal warrantless
23 search incident to arrest, yet does not address the basic discovery issues of where, how, and when
24 the phone was located and/or searched. Search and seizure law is obviously a fact based inquiry.
25 Because defendant's motion has not flushed out the essential facts regarding the arrest of the
26 defendant and the cell phone seizure and download, defendant Ferdinand requests this Court to
27 reserve ruling on the motion to suppress until discovery is produced as to the subject arrest
28 incident and the subsequent cell phone search.

1 **STATEMENT OF FACTS**

2 Perhaps the underlying motion to suppress would have been better labeled as a motion for
3 discovery regarding the seizure of Esau Ferdinand's phone on October 25, 2011, particularly
4 given the government's Opposition. In the declaration of counsel accompanying the original
5 motion to suppress [Dkt. No. 483], it was pointed out that with the present state of discovery
6 production, defense counsel had not received an actual arrest report for the arrest of Defendant
7 Esau Ferdinand on October 25, 2011 and was not aware of the San Francisco Police
8 Department's explanation as to the seizure of a cell phone possessed by Esau Ferdinand, or its
9 subsequent download. Defendant does not dispute that in October 2011 there was an active
10 warrant for his arrest. An inspector's report has been produced which gives an indication that Mr.
11 Ferdinand was arrested at approximately 1:30 p.m. on October 25, and that he was taken to
12 Southern Station (BG005730). There is a download of a cell phone which was produced labeled
13 "Ferdinand's Telephone", with a report dated October 25, 2011 at 4:08 p.m., (BG005840-6180;
14 also, BG080255-06), but there is no indication as to whether it was done pursuant to a warrant,
15 who seized the cell phone and when or how, and/or who directed the download, or who did the
16 later download and under what circumstances.

17 The government's responsive pleading now confirms that the search of the cell phone was
18 warrantless, but provides no further information as to the facts regarding the arrest of the
19 defendant, the seizure of the phone, and its later download. (Opposition 2:14-3:6) Defendant
20 now submits that until that discovery is produced, the hearing on this motion should be continued
21 until the specifics of the search and seizure can be addressed.

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CONCLUSION

For the foregoing reasons, Defendant Esau Ferdinand respectfully requests that this Court defer ruling on his motion to suppress until discovery has been produced and a briefing schedule and future hearing date are set.

Dated: October 8, 2015

Respectfully submitted,

/s/

ROBERT WAGGENER
Attorney for Defendant
ESAU FERDINAND